Supreme Court, U.S.
FILED

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NO._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JUAN ANTONIO FUENTES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S DECISION DENYING PETITIONER, JUAN ANTONIO FUENTES' MOTIONS FOR MISTRIAL. THE EVIDENCE WHICH THE GOVERNMENT WITNESSES TESTIFIED SO TAINTED THE TRIAL THAT THE PREJUDICIAL EFFECT COULD NOT BE CURED. A MISTRIAL SHOULD HAVE BEEN GRANTED.

PARTIES TO THE PROCEEDING

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NO. _____

IN THE

Supreme Court of the United States

October Term, 1993

JUAN ANTONIO FUENTES,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, **JUAN ANTONIO FUENTES**, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered *November 29, 1993.*

OPINION BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit was issued in an unpublished opinion, a copy of which is appended hereto as an Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition seeks review of the decision of the United States Court of Appeals for the Fifth Circuit, announced on *November 29, 1993.* This Petition is timely

filed within ninety days after judgment. Rule 13.1, Supreme Court Rules.

Jurisdiction of this court to review the judgment in question by Writ of Certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States, Section 1, states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

By Grand Jury indictment returned in the Western District of Texas, Petitioner **Juan Antonio Fuentes** and Co-Defendant Santos Limones, were charged by way of a Two Count Criminal Indictment, DR-92-CR-80, filed on August 7, 1992, in the Western District of Texas, Del Rio Division. **(R-Vol. 1, pages 16-17)**.

Count One, charged the Defendants with beginning in October 1990, and continuing through December 1991, in the

Western District of Texas and divers other places to the Grand Jurors known and unknown, Defendants, Santos Limones, and **Juan Antonio Fuentes**, and other persons to the Grand Jurors known and unknown, unlawfully, willfully, and knowingly did combine, conspire, confederate, and agree together and with each other to possess with intent to distribute more than 5 kilograms of cocaine, a Schedule II, Controlled Substance, contrary to Title 21, United States Code, Sections 841 (a) (1) and 846. **(R-Vol. 1, page 16)**.

Count Two that on or about November 2, 1990, in the Western District of Texas, Defendants did unlawfully, knowingly and intentionally possess with intent to distribute more than 5 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841 (a) (1). **(R-Vol. 1, page 17)**.

On December 14, 1992, Petitioner, **Juan Antonio Fuentes** and his Co-Defendants selected a jury to proceed to trial. Trial continued until December 18, 1992. The jury in San Antonio, Texas, found Petitioner, **Juan Antonio Fuentes** guilty on each of the Two Counts. On February 1, 1993, the Court sentenced Petitioner, **Juan Antonio Fuentes** to the custody of the Bureau of Prisons for a term of 188 months. The term consisted of 188 months on each of Counts One and Two to be concurrently served. **(R-Vol. 1, pages 6-7)**. Petitioner, **Juan Antonio Fuentes** upon release shall be placed on supervised release for five (5) years to run concurrently on each count. The fine was waived because of Petitioner, **Juan Antonio Fuentes'** inability to pay. Judgment was filed on February 18, 1993, and timely Notice of Appeal was duly filed on February 22, 1993. **(R-Vol. 1, page 5)**.

Petitioner, **JUAN ANTONIO FUENTES**, argued before the Court of Appeals for the Fifth Circuit that the

District Court erred in not granting a mistrial. The prejudicial effect of the evidence as testified to by several government witnesses so tainted the trial that the prejudicial effect could not be cured.[1] It is difficult for jurors to erase such seriously prejudicial evidence from their minds.

On direct examination by the government, Ricardo Almeda Alvarado a/k/a Prieto testified as to the murder of Francisco Rodriguez Hernandez. The Trial Court had previously ruled in granting Defense Motion in Limine C, that any testimony as to this murder would be excluded and not considered by the jury.[2] Later the government made another reference to this murder by admitting a tape which further discussed the extrinsic act of murder.

The government also elicited evidence placing before the jury the clear implication that threats had been made by Petitioner, **Juan Antonio Fuentes** and Co-Defendant, Santos Limones against Ricardo Almeda Alvarado a/k/a Prieto and his family for him having taken the stand to testify against them. This constitutes error.

The trial further was severely tainted through a "non responsive prejudicial answer" by government witness U.S. Marshall, James W. Lee. **(TAPE NO. 2; 12/17/92; 10:34:20)**. The final Motion for Mistrial concerned the testimony of several government witnesses who testified as

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[1]/Petitioner also argued before the Court of Appeals for the Fifth Circuit that the evidence was insufficient to sustain Petitioner's convictions, and that due to a fatal variance between the government's proof and the indictment the convictions cannot stand.

[2]/Counsel for Petitioner, **Juan Antonio Fuentes**, joined in on Defendant Santos Limones' Motion In Limine B, and C (Tape No. 12/16/92, 10:44:05-15).

to co-conspirator statements introduced into evidence *prior* to the Court's mandatory threshold finding that a conspiracy did in fact exist.

A mistrial should have been granted because there remained a significant possibility that this evidence had a substantial adverse impact on the jury verdict. *United States v. Kimble*, 719 F.2d 1253, 1257 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984). The cumulative error during the trial so tainted the proceedings denying Petitioner, **Juan Antonio Fuentes** any chance of a fair trial. *United States v. Escamilla*, 666 F.2d 126, 128 (5th Cir. 1982). Moreover, the evidence of Petitioner's guilt was not overwhelming. *United States v. Hernandez*, 750 F.2d 1256 (5th Cir. 1985).

The Court of Appeals for the Fifth Circuit found that the Trial Court *erred* in admitting irrelevant and prejudicial evidence of Francisco Rodriguez Hernandez's murder. The Court, thus had to determine whether the error was harmless. *See*, FED.R.CRIM. P. 52(a). The Fifth Circuit Court of Appeals held that in view of the overwhelming evidence of Petitioner, **Juan Antonio Fuentes'** guilt, and the unlikelihood that the prejudicial evidence had a substantial influence on the outcome of the trial, that the Trial Court's error was harmless.

REASON FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S DECISION DENYING PETITIONER, JUAN ANTONIO FUENTES' MOTIONS FOR MISTRIAL. THE EVIDENCE WHICH THE GOVERNMENT WITNESSES TESTIFIED SO TAINTED THE TRIAL THAT THE PREJUDICIAL

EFFECT COULD NOT BE CURED. A MISTRIAL SHOULD HAVE BEEN GRANTED

The Fifth Circuit Court of Appeals erred in upholding the lower Court's decision denying Petitioner, **Juan Antonio Fuentes,** a mistrial. The Court found that the Trial Court had *erred* in admitting irrelevant and prejudicial evidence against Petitioner, but that in the final analysis the error was harmless. Nothing could be further from the truth. Petitioner, **Juan Antonio Fuentes** was not afforded a fair trial as guaranteed by the Constitution of the United States.

Before a federal constitutional error can be held harmless, the Court must be able to declare that it was harmless beyond a reasonable doubt. Applying the foregoing standard, there should be no doubt that the error in Petitioner, **Juan Antonio Fuentes'** case was *not* harmless. To reach this conclusion a person need only review the record of this case. Petitioner was entitled to a trial free from the pressure of unconstitutional highly prejudicial inferences.

In this case, the government did not demonstrate, beyond a reasonable doubt, that the prejudicial effect of the evidence testified as to by several government witnesses did not taint the trial The extrinsic act evidence did contribute to Petitioner's convictions. Beyond a reasonable doubt is the standard that must be adhered to *prior* to determining that such evidence is harmless. This the Fifth Circuit Court failed to do. *See*, *Chapman v. State of California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L.Ed. 2d 705 (1967).

In the instant case on direct examination by the government, Ricardo Almeda Alvarado a/k/a Prieto testified

to a highly prejudicial extrinsic act, i.e., the murder of Francisco Rodriguez Hernandez. The Trial Court had previously ruled in granting Defense Motion in Limine C, that any testimony as to this murder would be excluded and not considered by the jury. The government later made another reference to the murder through admitting a tape into evidence which further discussed the act of murder. Defense Counsel objected. The Trial Court, however did not rule, or even instruct the jury to disregard the testimony. **(Tape No. 1; 12/16/92; 2:58:32)**. When the tape was introduced, the Trial Court erred by allowing it to become part of the record. **(Tape No. 2; 12/17/92; 2:07:50)**.

The government also elicited evidence placing before the jury the clear implication that threats had been made by Petitioner, **Juan Antonio Fuentes** and Co-Defendant, Santos Limones against Ricardo Almeda Alvarado a/k/a Prieto and his family for him having agreed to take the stand as a government witness to testify against them.

The government asked, "Do you have any concern for your safety and for that of your family for having taken the stand?" **(Tape No. 1; 12/16/92; 3:46:00)**. Response by Ricardo Almeda Alvarado, "yes". **(Tape No. 1, 12/16/92; 3:46:18)**. There was *no* basis for the government to have asked the question. The objection by Defense Counsel was sustained and the jury was instructed to disregard the testimony. The Motion for Mistrial however was erroneously denied by the Court.

The Trial Court further allowed a "non responsive prejudicial answer" by government witness U.S. Marshall, James W. Lee to become part of the record. The final Motion for Mistrial concerned the testimony of several government witnesses who testified as to co-conspirator statements introduced into evidence *prior* to the Court's

mandatory threshold finding that a conspiracy did in fact exist.

Nothing in the record reflects that the Courts applied the *Beechum* test to Petitioner, **Juan Antonio Fuentes'** case. A careful application of the two - prong test of *Beechum* is mandatory to protect defendants from unfair prejudice of extrinsic act evidence. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S. Ct 1244, 59 L.Ed. 2d 472 (1979).

Under the *Beechum* test, a Court must first determine that the extrinsic offense evidence is relevant to an issue other than the defendant's character, and then "the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403" *Beechum*, 582 F.2d at 911; *See*, also *United States v. Zabaneh*, 837 F.2d 1249, 1264 (5th Cir. 1988). The Trial Court, nor the Fifth Circuit Court of Appeals adhered to the mandatory requirements of *Beechum*. Nor was the error harmless. Given that the government's questions and argument were improper, the error is harmless *only* if beyond a reasonable doubt the error did not contribute to the jury's verdict. *See*, *Chapman v. California*, *supra*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 2d 705 (1967), *United States v. Norris*, 910 F.2d 1246, 1247 (5th Cir. 1990). In this case such a determination was not properly made.

The extrinsic act evidence of the murder of Francisco Rodriguez Hernandez was extremely prejudicial. The introduction of inadmissible evidence of a criminal act that Petitioner, **Juan Antonio Fuentes** had nothing to do with, that may have been committed by associates runs the risk of a finding of guilt by association. Courts have repeatedly noted the highly prejudicial effect of the introduction of evidence which suggests guilt by association. *See*, *United*

States v. McConnell, 988 F.2d 530, 534 (5th Cir. 1993); *United States v. Romo*, 669 F.2d 285, 288 (5th Cir. 1982); *United States v. Singleterry*, 646 F.2d 1014, 1018 (5th Cir. 1981); *United States v. Labarbera*, 581 F.2d 107, 109 (5th Cir. 1978). This extrinsic offense evidence was *not* relevant to any issue other than to show that Petitioner, **Juan Antonio Fuentes** was of "bad" character. In Petitioner's case the jury could have easily concluded that he was involved in this murder. Clearly, the admission of this evidence was *fatal* to his convictions. Even if the jury had sufficient relevant evidence to sustain the verdict which it did not. *United States v. Anderson*, 933 F.2d 1261, 1269 (5th Cir. 1991). Reversal is therefore required.

A second Motion for Mistrial was requested by Petitioner, **Juan Antonio Fuentes**, when the government asked Ricardo Almeda Alvarado a/k/a Prieto if he feared for his safety and that of his family. Counsel for the government in *bad faith* elicited a positive response. This testimony was so damaging that any instruction by the Court to disregard it could not cure the prejudicial effect on Petitioner. This is a case where the evidence of a *false* threat was so highly prejudicial as to be incurable by the Trial Court's admonition and therefore the instruction is considered insufficient. *United States v. Smith*, 517 F.2d 710, 711 (5th Cir. 1975). This reference elicited by the government of false extrinsic act evidence is reversible error because there is a significant possibility that it had a substantial impact on the jury verdict. *United States v. Klein*, 546 F.2d 1259 (5th Cir. 1977).

This is so, because the jurors could not possibly erase it from their minds. The logical thought process dictates to a person that Petitioner, **Juan Antonio Fuentes** would not have made such a threat, unless he was guilty. There was however, *no* factual basis for the government to ask such a

question. Even if there had been substantially outweighing the probative value of the disputed evidence was the severe prejudice to Petitioner, **Juan Antonio Fuentes**. It suggested to the jury that he was guilty. This facelifted the government's case by injecting proof of guilt by logical reasoning. This constitutes harmful error.

Thereafter, at least on two (2) more occasions highly prejudicial evidence further tainted the trial. The Fifth Circuit rather than evaluate the cumulative effect of all the error combined looked solely at the error as *insignificant* evidence of separate extrinsic acts. The Court did so to uphold the convictions of Petitioner, **Juan Antonio Fuentes**. This constitutes error. A mistrial should have been granted because there remained a significant possibility that all this prejudicial evidence had a substantial adverse impact on the jury verdict. *United States v. Kimble*, 719 F.2d 1253, 1257 (5th Cir. 1983). This testimony further violated Petitioner's Fourteenth Amendment right to a fair trial free from highly prejudicial and irrelevant evidence. *Clark v. Duckworth*, 906 F.2d 1174, 1177 (7th Cir. 1990). Consequently, **Juan Antonio Fuentes'** convictions should be reversed by this Honorable Court.

The admission of all the above mentioned testimony, therefore, was not harmless error. *See*, *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 283 (3rd Cir. 1976). Error is harmless only if it is highly probable that it did not contribute to the judgment. The better test has been articulated by this United States Supreme Court in its *Chapman* decision. That before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Chapman, *supra* 87 S.Ct. 824, 828 (1967). This, the Fifth Circuit failed to do.

Generally, the government is prohibited from making arguments that go beyond the evidence, mislead the jury, or inflame the jury to act as the conscience of the community. *United States v. Phillips*, 664 F.2d 971, 1030 (5th Cir. 1981) (Unit B). In this case the government's arguments, i.e., of murder, and threats towards a government witnesses' safety and that of his family was fundamentally unfair within the meaning of the due process clause of the Fourteenth Amendment. A new trial is justified in this case.

The government understanding that it is prohibited from making these arguments, constantly has retreated to its line of final defense that the error was harmless because proof of Petitioner, **Juan Antonio Fuentes'** guilt was overwhelming. This was not the case. The law of the Fifth Circuit as to the use of accomplice or co-conspirator testimony is clear. A conviction may be based on uncorroborated testimony of an accomplice or of someone making a plea bargain with the government, *provided* that the testimony is not incredible or otherwise insubstantial on its face. *United States v. Greenwood*, 974 F.2d 1449, 1458 (5th Cir. 1992); *United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991).

The government in this case relied *solely* on the testimony of Ricardo Almeda Alvarado a/k/a Prieto, an unsavory character to convict Petitioner, **Juan Antonio Fuentes**. His pivotal testimony due to his lack of personal knowledge, inconsistencies, and his lack of credibility rose to the level of being insubstantial or incredible as a matter of law. *See*, *United States v. Greenwood*, 974 F.2d 1449, 1458 (5th Cir. 1992). Testimony of law enforcement revealed that there was *no* basis upon which the jury could conclude that Petitioner, **Juan Antonio Fuentes** participated in any criminal related activities. Two days prior to trial, Ricardo Almeda Alvarado a/k/a Prieto *admitted* that Petitioner, **Juan**

Antonio Fuentes had *no* knowledge of the cocaine deals, or *had anything* to do with the transactions. **(Tape No. 1, 12/16/92; 3:03:12).** Thus, as to Petitioner, the evidence supports equally or nearly equally a theory of guilt as a theory of innocence. *United States v. Sanchez*, 961 F.2d 1169, 1180 (5th Cir. 1992). Certainly, in view of the facts of this case a reasonable jury must necessarily have entertain a reasonable doubt. *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982). In this case the jury, nor any person could have relied on the testimony of Ricardo Almeda Alvarado. The jury erroneously found Petitioner, **Juan Antonio Fuentes** guilty. His convictions must be reversed by this Honorable Court.

The *cumulative error* during this trial so tainted the proceedings denying Petitioner, **Juan Antonio Fuentes**, any chance of a fair trial. The prejudicial effect of so much improper testimony, so tainted the trial that a jury is unlikely to be able to erase it from their minds. *United States v. Escamilla*, 666 F.2d 126, 128 (5th Cir. 1982).

In *Escamilla* only once did prejudicial testimony come out. Petitioner, **Juan Antonio Fuentes**, in this case could not have been afforded a fair trial because no less than four times, the government brought out highly prejudicial testimony. There was no way, even with proper instruction that a jury could disregard so much prejudicial testimony.

In *United States v. Escamilla*, *supra* at 128 the Fifth Circuit set the standard of review for mistrial:

> However, where evidence is so prejudicial that the jury will unlikely be able to erase it from their minds, then a mistrial should be ordered. *United States v. Klein*, 546 F.2d 1259, 1263 (5th Cir. 1977); *United States v.*

DeDominicus, 332 F.2d 207, 210 (2nd Cir. 1964). As we have previously stated,

> To require a new trial, the prejudicial effect of improper matter, viewed in the context of that particular trial, must not be overwhelmed by evidence of guilt. A significant possibility must exist that, considering the other evidence presented by both the prosecution and the defense, the....statement had a substantial impact upon the verdict of the jury, *United States v. Rojas*, *supra*; *United States v. Rodriguez*, 524 F.2d 485, 487 (5th Cir. 1975), *Cert. denied*, 424 U.S. 972 96 S.Ct 174, 47 L.Ed. 2d 741 (1976); *United States v. Arenas-Granada*, 487 F.2d 858, 859 (5th Cir. 1973).

Petitioner, **Juan Antonio Fuentes**, incorporates his argument made as to insufficiency of evidence and would state that there was no overwhelming evidence that he was guilty of the offenses alleged in the indictment against Petitioner.

There was no sufficient evidence to show that Petitioner was guilty at all. As stated in *Escamilla* at 129:

> A Court's assessment of the impact of a prejudicial statement is tempered by the substantiality of evidence of the Defendant's guilt. We have previously recognized that other significant evidence of guilt reduces the likelihood that improper testimony had a substantial impact upon the verdict of the jury. See *United States v. Rojas*, *supra*, *United States v. Bryant*, 490 F. 2d 1372,

> 1378-79 (5th Cir). *Cert. denied*, 419 U.S. 832, 95 S. Ct. 57, 42 L.Ed. 2d 58 (1974); *United States v. Roland*, 449 F.2d 1281, 1282 (5th Cir. 1971). Conversely, the absence of overwhelming evidence decreases the likelihood that a jury would be able to disregard a prejudicial statement in considering the evidence and reaching a verdict.

Therefore, Petitioner, **Juan Antonio Fuentes** is entitled to have the convictions reversed and a new trial granted. *Escamilla* at 129.

A Mistrial also should have been granted because the extrinsic act evidence of the murder of Francisco Rodriguez Hernandez was *fatal* to Petitioner, **Juan Antonio Fuentes'** convictions. Moreover, the government elicited very damaging testimony in regards to Ricardo Almeda Alvarado's a/k/a Prieto, concern for his safety and that of his family for having taken the stand. There was *no* basis for the government to have sought out such testimony. Because of this highly prejudicial testimony and the rest of the improper evidence, Petitioner, **Juan Antonio Fuentes** was unable to prepare a defense, and thus denied a fair trial.

In the instant case, the evidence may have been uncontroverted as to some defendants, but as to Petitioner, **Juan Antonio Fuentes**, the evidence was by no means overwhelming, and the cumulative error was so prejudicial that a mistrial clearly was in order. *See*, *United States v. Escamilla*, 666 F.2d 126 (5th Cir. 1982), it was held that the testimony was so prejudicial as to warrant a mistrial because there was a "significant possibility" that the statement had a substantial impact upon the verdict of the jury and the evidence of defendant's guilt was not overwhelming. The same *significant possibility* exists in this case. *United States*

v. Hernandez, 750 F.2d 1256 (1985), also supports Petitioner's position. (The Court held that the prosecutor's elicitation of inadmissible testimony from a drug enforcement agent that U.S. Customs had identified Defendant as drug smuggler was reversible error). The government here also elicited inadmissible testimony.

Thus, we have highly prejudicial testimony of the extrinsic act of murder, evidence of threats allegedly made by Petitioner, **Juan Antonio Fuentes**, and thereafter at least on two (2) more separate occasions highly prejudicial evidence which further tainted the trial. All of this testimony in conjunction with the lack of overwhelming evidence of Petitioner's guilt, renders the irrelevant and prejudicial error by the Trial Court harmful. To hold otherwise would render the judicial process to be nothing more than a mockery of justice.

Therefore, Petitioner's convictions should be reversed.

The Fifth Circuit Court of Appeals erroneously did not properly rule on the issue herein brought forward by Petitioner, **Juan Antonio Fuentes**. It is clear that the Trial Court abused its discretion. Petitioner therefore respectfully requests that his convictions be reversed, and a new trial granted.

CONCLUSION

For the reasons stated, this Court should issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

U.S. COURT OF APPEALS
F I L E D
NOV 29 1993
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8152

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SANTOS LIMONES and JUAN ANTONIO FUENTES,
Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas

Before REYNALDO G. GARZA, KING and DeMOSS, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Santos Limones and Juan Antonio Fuentes appeal their convictions for conspiracy to possess cocaine and

possession of cocaine with intent to distribute. Finding no error, we AFFIRM.

I. FACTS

On November 1, 1990, Armando Ramirez, an agent of the Drug Enforcement Administration, received a phone call from Francisco "Pancho" Rodriguez Hernandez ("Rodriguez"). Rodriguez called to provide information about a load of cocaine being transported in a pickup truck in Eagle Pass, Texas. Acting on that information, government agents found a load of cocaine in Eagle Pass the next day. Based on their investigation, agents concluded that Rodriguez had removed some of the cocaine from the pickup truck before reporting the load to Agent Ramirez.

Ricardo Almeda-Alvarado ("Almeda"), a convicted drug dealer, testified for the Government pursuant to a plea bargain agreement. Almeda admitted that he would receive a more lenient sentence as part of his plea bargain agreement. Almeda testified that Rodriguez sent him some cocaine to sell on November 1 or 2. Almeda took this cocaine to Ft. Worth after a buyer was found for the cocaine by Juan Antonio Fuentes ("Fuentes"). Almeda also testified that they were going to sell the cocaine for $18,000 a kilo and that Fuentes was going to receive $1,000 a kilo for "this deal." Almeda further testified that Santos Limones ("Limones") helped transport the cocaine to Ft. Worth. Almeda claimed that Limones helped him transport cocaine to Ft. Worth on two different occasions, making two trips on each occasion.

Almeda testified that Limones drove a station wagon with the cocaine hidden in the sides of the vehicle. Almeda and Fuentes drove in a separate "lead car". The lead car was driven by Almeda and Fuentes was the passenger.

When the three men arrived in Ft. Worth, Almeda phoned the purchaser of the cocaine, Jaime Garcia ("Garcia"). After Garcia arrived, he and Fuentes left in a car with the cocaine and Almeda and Limones stayed behind. Fuentes and Garcia returned more than an hour later with the proceeds from the sale of the cocaine. Almeda, Limones and Fuentes went back to Del Rio that night and they returned to Ft. Worth a few days later with another load of cocaine.

II. PROCEDURAL HISTORY

Limones and Fuentes were charged in a two-count indictment with conspiracy to possess more than five kilograms of cocaine in violation of 21 U.S.C. sections 841(a)(1) and 846 (count one), and with possession with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. section 841(a)(1) (count two). The case went to trial on December 14, 1992 before Judge Prado of the Western District of Texas, and on December 18, 1992 the jury convicted Limones and Fuentes on both counts. On February 1, 1993 Limones was sentenced to 210 months imprisonment on counts one and two, to run concurrently, and to a five-year term of supervised release. Limones was also ordered to pay $100 in special assessments. Fuentes was sentenced to 188 months of imprisonment on courts one and two, to run concurrently, and to a five year term of supervised release. Fuentes was also assessed $100. Limones and Fuentes ("appellants") timely appealed to this court.

III. ANALYSIS

The appellants' claim the district court erred in: (1) refusing to grant a mistrial on four separate occasions; and (2) admitting irrelevant and prejudicial hearsay evidence. Fuentes, alone, claims the district court erred in finding

sufficient evidence to uphold his conviction, and that a fatal variance exists between the Government's proof and the indictment.

We find that the district court did not err in: (1) refusing to grant the appellants' motions for mistrial; and (2) finding sufficient evidence to uphold Fuentes' conviction. Although the district court erred in admitting irrelevant and prejudicial evidence, this was harmless error. Finally, a fatal variance does not exist between the Government's proof and the indictment.

A. *Motions for mistrial*

The appellants argue that the district court erred in refusing to grant a mistrial on four separate occasions. They claim the first error concerned testimony regarding the death of Rodriguez. The appellants assert that Limones moved in his Motion in Limine C to preclude the government from alluding in any manner before the jury to the nature and cause of Rodriguez's death.[1] The appellants argue that although the Government did not elicit the testimony, its witness, Almeda gave a "nonresponsive answer" to a question that so tainted the minds of the jurors that a mistrial should have been granted.[2] Also, during the testimony of

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[1] The district court granted the motion, noting that it would rule on the admissibility of the evidence concerning Rodriguez's murder when the Government intended to introduce the evidence.

[2] The testimony in question is the following:

PROSECUTOR: I'm--I forgot to ask you this one question. Mr. Almeda. At the time that you were meeting with Miguel from Houston, did you at any time introduce[] [sic] Santos Limones to that officer?

Agent Delfino Sanchez, Jr., tapes of his conversation with Almeda were introduced into evidence. These tapes again referred to Rodriguez's murder.

The appellants assert that a second motion for mistrial was requested when the Government asked Almeda if he had any concern for his safety or the safety of his family for having taken the stand. Almeda answered affirmatively. The appellants argue that the Government elicited this testimony in bad faith, because it could not prove that any threats had been made. The appellants argue that even though the district court instructed the jury to disregard the question and the answer, no instruction could cure the prejudicial effect upon the jury.

Limone alone moved for a mistrial when Deputy Marshal James Lee stated that Almeda had been dealing drugs for "several years. . . he's been in the business about as long as Mr. Limones has." Limones acknowledges that the district court properly instructed the jury to disregard the testimony. However, Limones argues that the district court's instruction could not remedy the prejudicial effect because the extrinsic-offense testimony closely resembled his charged offense. *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir. 1986) (en banc), *cert. denied*, 440 U.S. 920 (1979). Limones further argues that the evidence of the uncharged drug dealing had a significant probability of substantially affecting the jury's verdict. *United States v. Kimble*, 719 F.2d 1253, 1257 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

ALMEDA: I didn't introduce him to him. I just--these people were coming to verify if I had--be Mr. Francisco Rodriquez, and--because they told me they had killed him, Mr.--whatever Miguel was supposed to be giving--Francisco the cocaine.

The appellants' final motion for mistrial concerned the testimony of several government witnesses who testified as to the alleged coconspirator statements introduced into evidence prior to the district court's mandatory "threshold" finding that a conspiracy did in fact exist. The Appellants argue that the district court erroneously ruled that the evidence presented by the Government gave the court sufficient reason to find a conspiracy.

The appellants argue that the cumulative error during this trial so tainted the proceedings that the jury was unlikely able to erase the prejudicial effect from their minds. *United States v. Escamilla*, 666 F.2d 126, 128 (5th Cir. 1982).

This court will reverse a district court's refusal to grant a mistrial only for an abuse of discretion. *United States v. Baresh*, 790 F.2d 392, 402 (5th Cir. 1986). Furthermore, where a motion for mistrial involves the presentation of prejudicial testimony before the jury, a new trial is required only if there is a "significant possibility" that the prejudicial evidence had a "substantial impact" upon the jury verdict, viewed in light of the entire record. *United States v. Escamilla*, 666 F.2d 126, 128 (5th Cir. 1982).

With regard to the appellants' first motion for mistrial, the Government points out that Almeda's testimony concerning Rodriguez's death was unresponsive to the question asked. In contrast to *Escamilla*, where the testimony in question was the only evidence establishing the defendant's guilt, the evidence of Rodriguez's murder did not contribute to the appellants' drug convictions. *Id.* Moreover, the district court asked the appellants if they wanted a curative instruction for the tape recorded conversations concerning Rodriguez's murder and the appellants declined the instruction.

Pertaining to the appellants' second and third motions for mistrial, the district court instructed the jury to disregard Almeda's testimony regarding his concern for his safety and that of his family, and U.S. Deputy Marshal Lee's characterization of Limones as a long time drug dealer. This court has declined to reverse a district court's refusal to grant a mistrial when the district court has immediately instructed jury to disregard the evidence of extrinsic offenses or other wrongs. *See*, *United States v. Walker*, 621 F.2d 163 (5th Cir.), *cert. denied*, 450 U.S. 1000 (1980).

Finally, addressing appellants' argument that the coconspirator statements were not made in the course of and furtherance of a conspiracy, the term "in furtherance" of a conspiracy is broadly construed and clearly encompasses the testimony contained in the taped conversation between Almeda and Sanchez. *See*, *United States v. Johnson*, 872 F.2d 612, 623 (5th cir. 1989). Furthermore, the district court expressly held that the requirements for the admission of coconspirator statements had been met. *United States v. Fragoso*, 978 F.2d 896, 899 (5th Cir. 1992).

The significant evidence of the appellants' guilt renders it unlikely that any or all of the testimony complained of had a substantial impact on the jury's verdict. *United States v. Rodriguez Arevalo*, 734 F.2d 612, 615 (11th Cir. 1984). Therefore, the district court did not abuse its discretion in refusing to grant the appellants' motions for mistrial.

B. *Evidentiary rulings*

Limones argues that the district court erred in admitting evidence that Rodriguez had been murdered by drug-dealing confederates. Limones argues that this evidence

was irrelevant and extremely prejudicial hearsay because the jury could easily have inferred that he was involved with the murder.

In reviewing a district court's evidentiary rulings, this court will reverse only for an abuse of discretion. *United States v. Anderson*, 933 F.2d 1261, 1267-68 (5th Cir. 1991). The district court erred in admitting irrelevant and prejudicial evidence of Rodriguez's murder. Thus we must determine whether this was harmless error. FED. R. CRIM. P. 52(a). In view of other overwhelming evidence of the appellants' guilt, as discussed in the sufficiency of the evidence section, and the unlikelihood that the prejudicial evidence had a substantial influence on the outcome of the trial, we find that the district court's error was harmless. *United States v. Poitier*, 623 F.2d 1017, 1021 (Fifth Cir. 1980).

C. *Sufficiency of the evidence*

Fuentes argues that the Government failed to prove each and every element of the offenses charged in the indictment. Fuentes argues that this court will reverse a conviction when the evidence is so weak or so contrary to guilt that it would compel a jury to entertain a reasonable doubt of the defendant's guilt. *United States v. Del Aguila-Reyes*, 722 F.2d 155, 157 (5th Cir. 1983).

Fuentes argues that after the conclusion of the Government's case there was clearly insufficient evidence to find him guilty. Fuentes argues that the only evidence that proves that he was involved in a conspiracy to possess cocaine is the uncorroborated testimony of coconspirator Almeda, a known drug dealer, and an address book seized

from defendant Alberto Trevino Alderete's[3] house which had Fuentes' name on it, and Fuentes' business card. Fuentes also argues that Almeda's testimony is incredible or otherwise insubstantial on its fact. *United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1992).

Fuentes further argues that the Government failed to show direct or circumstantial evidence that he was a willing and knowing participant in the possession of cocaine. Fuentes argues that the fact that Limones was in possession of the vehicle with the cocaine, while he was a passenger in the lead car is insufficient by itself to sustain a conviction against him for the conspiracy to possess with intent to distribute cocaine, or for possession of cocaine. *United States v. Ascarrunz*, 813 F.2d 759 (5th Cir. 1988).

In reviewing challenges to the sufficiency of the evidence, this court must determine whether a rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. *United States v. Carrasco*, 830 F.2d 41, 43 ((5th Cir. 1987). In making this determination, this court considers the direct and circumstantial evidence in a light most favorable to the government, and accepts all reasonable inferences which tend to support the jury's verdict. *Id.* at 43-44. To establish the offense of a drug conspiracy, the Government must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of the conspiracy, and that he voluntarily joined it. *United States v. Rodriguez-Mireles*, 896 F.2d 890, 892 (5th Cir. 1990). To establish the offense of possession of a controlled substance with intent to distribute, the government must prove knowing possession of the contraband with intent to

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[3] Trevino Alderete was originally charged with Fuentes and Limones, however, after the trial began, he changed his plea to guilty.

distribute. *United States v. Romero-Reyna*, 867 F.2d 834, 836 (5th Cir. 1989.

Fuentes' argument is basically that the evidence is insufficient because Almeda's testimony should not have been believed. The fact that Almeda is a known drug dealer, however, goes to the weight rather than the sufficiency of the evidence. *See*, *United States v. Greenwood*, 974 F.2d 1449, 1458 (5th Cir. 1992), *cert. denied sub nom.*,—U.S.—, 113 S.Ct. 2354 (1993).

Evidence at trial established that Fuentes was directly involved in the plan to transport the cocaine to Ft. Worth. The evidence also established that Fuentes found a buyer for the cocaine. Specifically, on November 1, Fuentes called his buyer and told him that "we [are] going over to Ft. Worth and take [sic] some cocaine and sell it over there." Upon Limones, Almeda and Fuentes' arrival in Ft. Worth, Fuentes called Garcia, the buyer of the cocaine. Subsequent to this phone call, Limones, Almeda and Fuentes met with Garcia at the J&J Auto Clinic. When they first arrived at the Auto Clinic, Garcia was already there and Fuentes was the first one to talk to Garcia. Garcia and Fuentes lift in a car with the cocaine while Almeda and Limones stayed behind. They returned more than an hour later with the proceeds from the sale of the cocaine. It was further established that Fuentes was going to receive $1,000 for "this deal."

Contrary to Fuentes' argument, evidence corroborating Almeda's testimony was introduced at trial. Employees from the Ft. Worth Holiday Inn and Motel 6, testified that Garcia rented a room at the Holiday Inn on or near the day in question and that Almeda rented a room at the Motel 6 on November 13 and 17, and December 12, 1990. Telephone bills and an address book containing

Fuentes' name and phone number, and Fuentes' business card further corroborate Almeda's testimony.

Therefore, sufficient evidence exists to uphold Fuentes' conviction on both counts.

D. *Variance between the Government's proof and the indictment*

Fuentes argues that a fatal variance exists between the indictment which charged "multiple conspiracies" and any actual proof of his involvement. Fuentes argues that at issue in his case was the sale of approximately 49 kilograms of cocaine in Ft. Worth. Fuentes argues that the testimony of 96 kilograms of cocaine seized in Eagle Pass, Texas and the 539 kilograms discovered in Normandy and Del Rio, Texas were evidence of "independent activities" which should not have been introduced into evidence. According to Fuentes, most of the evidence elicited at trial dealt with two other discrete conspiracies. Fuentes argues that although there may have been some evidence of his involvement with the Ft. Worth venture, there was no evidence linking him to the Eagle Pass or Del Rio ventures.

"We have held that a variance between the offense charged in the indictment and the proof relied upon at trial constitutes reversible error if it affects the substantial rights of the defendant." *United States v. Hernandez*, 962 F.2d 1152 (5th Cir. 1992), *cert. denied*, —U.S.—, 113 S.Ct. 2429 (1993). Furthermore, "[w]e have long held that when the indictment alleges the conspiracy count as a single conspiracy, but the 'government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights.'" *United States v. Jackson*, 978 F.2d 903 (5th Cir. 1992) (*citing*, *United States v. Richerson*, 833 F.2d

1147, 1155 (5th Cir. 1987)). At the very least, the Government established that Fuentes was involved in the Ft. Worth conspiracy. Therefore, the district court correctly held that Fuentes' substantial rights were not affected.

IV. CONCLUSION

For the reasons stated above, Limones and Fuentes' conviction are AFFIRMED.

NO._____

In the Supreme Court of the United States

October Term, 1993

JUAN ANTONIO FUENTES

Petitioner,

V.

UNITED STATES,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, Victor Roberto Garcia, do swear that on this date, February 25, 1994, pursuant to Supreme Court Rules 29.3 and 29.4, that I have served the attached Petition For A Writ Certiorari on each party to the above proceeding, or that party's Counsel, and on every other person required to be served by depositing an envelope containing the above

documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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_____
Victor Roberto Garcia, Affiant

SUBSCRIBED AND SWORN to before me, on this _____ day of February, 1994.

_____
Notary Public - State of Texas